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IN THE

Supreme Court of the United States

CAROL HARLEY, *et al.*,

Petitioners,

—v.—

3M COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF PROFESSOR JOHN H. LANGBEIN IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICUS CURIAE*[1]

Amicus John H. Langbein has, since 2001, been the Sterling Professor of Law and Legal History at Yale University and from 1990 to 2001 was the Chancellor Kent Professor of Law and Legal History at Yale University. *Amicus* has taught and lectured and written widely on the Employee Retirement Income Security Act of 1974 (ERISA), investment policy and the law of trusts. *Amicus'* publications include Pension and Employee Benefit Law (with Bruce Wolk) (3d ed., Foundation Press 2000 & 2002 Supp.), the leading book used in most American law schools that offer an ERISA course. *Amicus* is a Uniform Law Commissioner and was the Reporter and principal drafter of the Uniform Prudent Investor Act (1994). *Amicus* has, since 1993, been Advisor, American Law Institute, Restatement of the Law of Trusts (Third). By virtue of his extensive experience, *amicus* has significant expertise and a special perspective on benefit and investment practices and protections of pension trusts and other trusts both before and after enactment of ERISA, including the ability of trust beneficiaries to secure redress for breaches of fiduciary duty by the trustees of those trusts.

As *amicus* demonstrates below, the decision of the Eighth Circuit Court of Appeals in *Harley v. Minnesota Mining and Manufacturing Company,* 284 F.3d 901 (8th Cir. 2002), severely impairs the rights of ERISA pension plan participants and beneficiaries to protect plan assets and, thus, their benefits, from imprudent and illegal investment practices. The *Harley* decision holds that if an "overfunded" defined benefit pension plan subject to ERISA suffers an investment loss which was caused by a breach of fiduciary

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* and his counsel disclose that no counsel for a party authored the brief in whole or in part, and that no person or entity, other than *amicus* or his counsel has made a monetary contribution to the preparation or submission of the brief. The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

duty, the plan's participants and beneficiaries lack standing to seek redress despite ERISA's specific grant of authority to do so. The decision contravenes the text of ERISA and is contrary to the fundamental protective purposes of both ERISA and the common law of trusts.

SUMMARY OF ARGUMENT

Amicus points out that the decision below is contrary to the text of ERISA and the Congressional intent as well as the legal protections that were available to employees and retirees before enactment of ERISA. As the Court has declared previously, courts should avoid interpretations of ERISA that either contravene its express language or afford less protection to employees and retirees than would have applied under the state law principles applicable before ERISA's enactment. Yet the decision below follows the opposite approach – ignoring the statutory text and Congressional intent and allowing well-developed fiduciary standards to be easily defeated by unredressable breaches of fiduciary duty.

The Eighth Circuit's decision is fundamentally flawed in that it seems to regard "surplus" in an ongoing plan (as opposed to a terminated plan) as somehow belonging to the sponsoring employer. *Harley v. Minnesota Mining and Manufacturing Company,* 284 F.3d 901, 906 (8th Cir. 2002) ("If the plan terminates with a surplus, the surplus may be distributed to 3M. ... Thus, the reality is that a relatively modest loss to Plan surplus is a loss only to 3M, the Plan's sponsor.") To the contrary, any excess assets in a pension plan belong to the plan, not the plan sponsor, and any loss, even if the plan remains overfunded, is a loss to the plan. Indeed, in an inherent contradiction, the Eighth Circuit also held that the investment loss caused the Plan "cognizable harm." *Id.* at 905.

The notion that participants and beneficiaries of an overfunded defined benefit pension plan do not have standing

under ERISA to sue for an investment loss to the plan caused by a breach of fiduciary duty is contrary to the text of ERISA, Congressional intent and the common law of trusts. The Eighth Circuit's decision evidences a serious misunderstanding both of ERISA in general and the concept of an overfunded plan in particular.

Harley creates a serious conflict in the Circuits regarding the question of standing of participants and beneficiaries to bring claims in such a circumstance. *Amicus* therefore urges that the Court grant the Petition for a Writ of Certiorari so that this matter of fundamental importance to employees, retirees, and employers may be definitively addressed.

ARGUMENT

I. BOTH ERISA'S TEXT AND LEGISLATIVE HISTORY UNEQUIVOCALLY GRANT STANDING TO PARTICIPANTS AND BENEFICIARIES TO SUE FOR REDRESS OF A BREACH OF FIDUCIARY DUTY WHICH HARMS THE PLAN

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), grants participants, beneficiaries, fiduciaries and the Secretary of Labor standing to sue for the relief authorized by ERISA § 409(a), 29 U.S.C. § 1109(a). This Court has previously held that "the entire text of § 409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself." *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985). Thus, regardless of whether a participant, beneficiary, fiduciary or the Secretary of Labor brings suit under § 502(a)(2), the suit is brought derivatively on behalf of the plan.

In *Pressroom Unions-Printers League Income Security Fund v. Continental Assurarnce Co.*, 700 F.2d 889 (2d Cir. 1983), an ERISA action commenced by an ERISA

plan in its own name, the Second Circuit explicitly held that plans are not authorized to bring actions under ERISA because they are not one of the persons specifically enumerated with such rights in ERISA § 502, 29 U.S.C. § 1132. The court so held despite the fact that ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1), states that a "plan may sue or be sued under this title as an entity." *Id.* at 892-893. The court held that this provision "only establishes the right of plans created by ERISA to sue and be sued like corporations and other legal entities. Without such a provision a pension plan would not be a legally cognizable body." *Id.* at 893 (citation omitted). Thus the court held that while plans may not bring actions under ERISA, they may "in other situations where there would properly be jurisdiction." *Id.* Because plans themselves are not one of the enumerated parties with standing to sue, and because this Court has held that ERISA's civil enforcement scheme is not to be expanded by the courts, *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 247 (2000), suits under § 502(a)(2) may only be brought derivatively on behalf of a plan by one of the parties enumerated in that section.[2]

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[2] By analogy, Fed. Rule Civ. Proc. 23.2 provides, in pertinent part:

> An action brought by or against an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will adequately protect the interests of the association and its members.

A purpose of Rule 23.2 is to enable an unincorporated association to sue when, for some reason, it lacked the capacity to sue or be sued. *Curley v. Brignoli, Curley & Roberts Associates*, 915 F.2d 81, 86-87 (2d Cir. 1990), citing advisory committee notes to Rule 23.2. However, the fact that Rule 23.2 provides an unincorporated association with entity status would not, in and of itself, provide its members with standing to sue under ERISA unless its members were also parties enumerated under § 502.

The question of whether Rule 23.2 pertains to ERISA plans has (Cont'd)

That Congress intended participants and beneficiaries to be able to pursue such claims cannot be denied:

> "Another reason why so many employees have found their pension expectations to be illusory is that the employer may shut down, and if there are insufficient funds to meet the vested claims of the participants, they have no recourse.
>
> "A classic case, of course, is the shutdown of Studebaker operations in South Bend, Ind., in 1963, with the result that 4,500 workers lost 85 percent of their vested benefits because the plan had insufficient assets to pay its liabilities.
>
> "While this was a spectacularly tragic instance, it was by no means unique. Last year, for example, P. Ballantine and Sons, a substantial contributor to a multiemployer plan, sold its operations and withdrew from the plan.
>
> "Because the plan did not have sufficient assets to cover vested liabilities, several hundred employees, with as many as 30 years service, will

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(Cont'd)
not, to a*micus*' knowledge, been addressed by any court. But, even though an ERISA plan would appear to be a Rule 23.2 unincorporated association, see, *e.g.*, *Blankenship v. Boyle*, 329 F. Supp. 1089, 1092 (D.D.C. 1971), Rule 23.2 would be unavailing to grant its members standing under ERISA. Congress thus provided the mechanism pursuant to which plans may be protected against ERISA violations by granting standing to plan participants, beneficiaries, fiduciaries and the Secretary of Labor.

> lose a substantial portion of their vested benefits.
>
> "These, of course, are by no means isolated cases. According to a recently-issued study by the Departments of Labor and Treasury, over 19,000 workers lost vested benefits last year because of the termination of insufficiently funded plans."

Nachman v. PBGC, 446 U.S. 359, 367 (1980), quoting 2 Legislative History of the Employee Retirement Income Security Act at 1599-1600 (GPO 1976).

ERISA's fiduciary regime is intimately connected to its reporting requirements. Disclosure to plan participants was designed to facilitate fiduciary enforcement:

> Disclosure . . . imparts to employees sufficient information and data to enable them to know whether the plan is financially sound and being administered as intended . . . . The information disclosed would **enable employees to police their plans**. . . . [There is] a need for more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan - what benefits he may be entitled to . . . . **The fiduciary responsibility section will operate efficiently only if fiduciaries are aware that . . . their dealings will be open to inspection and the . . . beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.**

S. Rep. No. 127, 93d Cong., 2d Sess. (1973), *reprinted in*, 1974 U.S.C.C.A.N. 4838, 4863 (emphasis added).

These excerpts from ERISA's legislative history evidence conclusively that (1) a main purpose in the passage of ERISA was to remedy participants' loss of benefits arising from the underfunding of pension plans, and that (2) Congress expressed the intent that participants be able to "police their plans" and be able to enforce the "obligations owed by the fiduciary to the plan in general."

The Eighth Circuit's decision in *Harley* contradicts Congress' unequivocal intent to enable employees to protect the pension plans in which they participate.

II. PARTICIPANTS SUFFER A COGNIZABLE INJURY WHEN A FIDUCIARY BREACHES A DUTY WHICH CAUSES THE PLAN A FINANCIAL LOSS

The decision in *Harley* evidences a fundamental misunderstanding about a participant's interest in a defined benefit pension plan. In a defined benefit plan, ERISA § 3(35), 29 U.S.C. § 1002(35), as the name suggests, a specific benefit is promised. One example of a defined benefit plan formula is a pension equal to a specific amount of monthly retirement benefits for each year of service. Thus, if a plan promised $10.00 per month at normal retirement age (generally 65 (ERISA § 3(24), 29 U.S.C. § 1002(24)) for each year of service, a participant who retired at normal retirement age with 30 years of service would receive a monthly benefit of $300.00.

Defined benefit plans often base their benefit formulas on a participant's compensation. For example, a plan might have a benefit formula that incorporates a percentage of a participant's average salary over the entire course of his or her career or, frequently, on the five consecutive years that provide the highest average.

Regardless of the exact formula, defined benefit plan formulas determine a monthly retirement benefit.

Whatever the formula, the money to pay for benefits comes only from contributions[3] and investment earnings. ERISA imposes funding requirements on defined benefit plans. ERISA §§ 301-308, 29 U.S.C. §§ 1081-1086. In general, each year the plan's actuaries calculate the amount that needs to be contributed to the plan by the sponsoring employer to meet these funding requirements. In order to make these calculations, the actuaries make various assumptions about mortality rates, employment termination rates, investment performance, etc. In this way the actuaries determine the plan's funding status, *i.e.*, whether, on a present value basis, the plan appears to have enough money to pay all the benefits accrued as of that date, assuming that actual future experience comports with the assumptions. If the plan has more assets than it is predicted to need, it is said to be overfunded. If it has fewer assets than it is predicted to need, it is said to be underfunded.

If the plan is significantly overfunded, no present contributions may be required. If it is somewhat less overfunded, contributions need only be made to fund "normal cost," *i.e.* the benefits that accrue in that year. If the plan is underfunded, contributions must be made to fund both normal cost and to amortize the underfunded liability. Based on any number of factors, including market performance and changes in interest rates, an overfunded plan can become an underfunded one, or *vice versa*, very quickly. Congress established minimum funding standards for defined benefit plans, ERISA §§ 301-308, 29 U.S.C. §§ 1081-1086, in order to ensure, to the extent possible, that there would be no repetitions of the Studebaker default.

Overfunding, of the sort authorized under these rules, provides participants protection in the event of either adverse investment performance of plan assets or employer/sponsor

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[3] Defined benefit plans are typically solely employer contributory.

financial adversity. It is because of the highly volatile nature of even prudent investments[4] that any overfunding must be assumed to be transitory and that the plan's asset pool must be safeguarded from imprudence. Any loss to an overfunded plan by its nature reduces the plan's participants' protection and thus risks impairing benefits, causing injury to the participants. In addition, significant overfunding often makes possible increases in benefits.[5] Investment losses obviously reduce the possibility of such increases, likewise injuring participants.

The decision in *Harley* reflects a gross misunderstanding of these concepts. The panel majority clearly viewed the plan's surplus as an asset of the sponsoring employer, *Harley* at 906, despite the fact that the plan is ongoing and, until all benefits are paid and the plan is terminated (which may never occur), the employer has no claim to the plan's assets. Indeed, all assets of the plan must be held in trust, ERISA § 403(a), 29 U.S.C. § 1103(a), and those assets may "never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries ..." unless and until the plan is terminated. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1).

Even after an overfunded defined benefit plan is terminated and all benefits have been paid, any surplus payable to the employer/sponsor is subject to a 50% excise tax, 26 U.S.C. § 4980(d)(1), in addition to regular income tax. Congress could not have been more emphatic about mandating not only adequate funding to ensure the payment

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[4] One need only recall that in October 1987 the stock market lost more than 20% of its value in one day.

[5] "A small increase in the rate of return on investments may have a significant impact upon benefit levels in the long run. A rule of thumb is that a consistent increase of only one-half of 1% in the annual rate of return can provide the means for increasing benefits 10-12%." M. Gertner, Trustees Handbook (International Foundation of Employee Benefit Plans 4th ed. 1990), ch. 31, p. 216.

of promised benefits, but also about its desire that even presently surplus plan assets be used for benefit payments rather than reverting to employers on termination.

That plan participants have the right to protect their plans against imprudent investment losses is both readily apparent and an integral part of ERISA's civil enforcement scheme. *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984). This Court has held that persons with interests far more tenuous and remote than ERISA plan participants nonetheless have standing to adjudicate those claims. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 684 (1973); *Village of Arlington Heights v. Metropolitan Housing development Corp.*, 429 U.S. 252, 261 (1977).

III. PETITIONERS' CLAIMS WOULD BE COGNIZABLE UNDER THE COMMON LAW OF TRUSTS

"Normally a suit against a trustee to enforce the trust or to enjoin or obtain redress for a breach of trust is brought by a beneficiary. ... If there are several beneficiaries, any beneficiary can maintain such a suit." Restatement (Second) of Trusts, § 200 cmt. a, § 214(1) (1959) ("Restatement"). See also A. Scott and W. Fratcher, *The Law of Trusts* § 200, p. 207, § 214, p. 316 (4th ed. 1988) ("Scott"); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 871, p. 158 (2d ed. rev. 1995). This rule is applicable even if the beneficiary's interest in the trust is contingent. Restatement, § 214(1) cmt. a.; Scott § 214, p. 316. "[W]hether beneficiaries have been financially damaged by the breach is immaterial." *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1408-09 (9th Cir. 1988), citing G. Bogert & G. Bogert, *The Law of Trusts and Trustees*,§ 543, p. 217 (2d ed. 1978).

In the recent case of *Barnhart v. Barnhart*, 415 Ill. 303, 114 N.E.2d 378

> [1953], we stated that a contingent beneficiary should not be denied the right to bring an action against the trustees merely because his interest is remote and contingent, but that he should have the right to such relief as is necessary to protect his possible eventual interest, *i.e.*, protect and preserve the trust *res*. A trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest in so far as necessary for the protection of the contingent beneficiary's rights in the trust property.

Giagnorio v. Emmett C. Torkelson Trust, 292 Ill. App.3d 318, 324, 686 N.E.2d 42 (1997), quoting *Burrows v. Palmer*, 5 Ill.2d 434, 440, 125 N.E.2d 484 (1955).

Because ERISA should not be interpreted to afford less protection to employees and retirees than would have applied under the state law principles applicable before ERISA's enactment, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113-14 (1989), the Eighth Circuit's decision in *Harley* is both fundamentally unsound and contravenes this Court's precedent.

IV. THE DECISION IN *HARLEY* IS CONTRARY TO PUBLIC POLICY

In the event of a termination of an underfunded defined benefit plan, the Pension Benefit Guaranty Corporation ("PBGC") will pay the benefits owed by the plan. ERISA § 4022, 29 U.S.C. § 1322. There is, however, a limit to the amount of benefits which the PBGC guarantees for any individual. *Id.* Benefit increases granted within a short time of plan termination will either not be paid or will be paid only in part. Benefits in excess of certain specified

limits will not be paid at all regardless of the plan's benefit formula.

Even if participants in overfunded plans do not have standing to sue for investment losses caused by fiduciary breaches, the decision in *Harley* at least suggests that participants in underfunded plans do have standing. Why this should be the case is unclear because, according to the reasoning of *Harley*, an investment loss to an underfunded plan cannot cause an individual participant a cognizable harm if his or her benefits will nonetheless be paid by the PBGC.

Therefore, it would seem that only those participants whose benefits exceed the PBGC guarantee level would have standing to sue in the event of a loss to an underfunded plan. This would mean that a participant whose benefits were below that level at the time of the breach would not have standing to sue but, if because of a subsequent increase in benefits his or her benefits rose above the PBGC guarantee level, he or she would then be able to sue, if the statute of limitations had not run.[6]

Taking *Harley* to its logical conclusion, the Eighth Circuit has determined that the wrongdoer who has caused the loss to the temporarily overfunded plan should be absolved of his or her breach of fiduciary duty because the PBGC will be there as the payer of last resort. It is dreadful public policy to say that the wrongdoer should escape liability because the government stands behind the obligation.[7]

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[6] Similarly, if a plan were underfunded when a suit was commenced but then became temporarily "overfunded," would the suit then have to be dismissed despite the loss and despite the lack of any assurance that the lost assets would not be needed to fund benefits? *Harley* would appear to mandate such a result.

Harley suggests that no such problems should ensue because the Secretary of Labor's standing to sue provides sufficient protection. *Harley* at 908 n.5, This does equal injustice to ERISA's enforcement scheme. The Secretary herself has acknowledged that the Department of Labor has insufficient resources and "must rely on private plaintiffs to

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CONCLUSION

Amicus supports the petition for a writ of *certiorari* to the Eighth Circuit and respectfully urges the Court to grant review of this case.

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(Cont'd)
vindicate their own rights." DOL Brief *Amicus Curiae* in Support of Petition for Rehearing at 12. Given that the PBGC's 2001 Annual Report reflects over 35,000 single employer pension plans, such as the 3M Plan at issue herein, covering more than 35 million employees, the Secretary makes a valid point.

Also, § 502(a)(2) provides equal enforcement authority to participants, beneficiaries and the Secretary. On the other hand, § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes participants and beneficiaries, but not the Secretary, to sue for "appropriate equitable relief" to redress violations of either ERISA or the terms of the plan while § 502(a)(5), 29 U.S.C. § 1132(a)(5), authorizes the Secretary to sue only for violations of ERISA. It was clearly Congress' intent to provide broader enforcement authority to participants and beneficiaries than to the Secretary.